No. 782

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED YOUNG CHICK, ET AL.,
APPELLANTS,

vs.

THE MERCANTILE TRUST COMPANY, ET AL.,
APPELLEES.

BRIEF OF APPELLANTS ON MOTION TO DISMISS APPEAL.

GEORGE E. CHURCH,
L. A. GROFF,
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.

Filed January ....., 1902. _Clerk

BAUMGARDT, PRINT, 231 W. FIRST, L. A.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

A. Y. CHICK, et al,
Appellants,
vs.
MERCANTILE TRUST COMPANY, et al,
Appellees,

BRIEF OF APPELLANTS ON MOTION TO DISMISS APPEAL.

There is a motion in this case to dismiss the appeal, based upon the ground that the appeal is from an order refusing to allow the appellants to intervene. This is an error. The appeal is not from an order refusing to allow the appellants to intervene, but from a final decree dismissing their bill in intervention filed by leave of Court, which is quite another thing. The record shows that the appellants regularly filed their petition for leave to intervene.

Record p. 44.

The prayer of the petition was as follows:

"Wherefore your petitioners pray that leave may be granted to them to intervene in the said suit and to file such pleadings in intervention as may be necessary to bring before the court the facts relating to the matters set forth, and to protect the interests of the petitioners and other bondholders who are not parties to the scheme for the re-organization of the said corporation defendant, and to obtain such relief in the premises as may be just and equitable, and for such other or further order in the premises as to the Court may seem meet and proper."

Record p. 51.

To this petition, the respondents offered to file an answer making a formal issue upon the allegations of the petition. This the court below refused to allow, and upon the verified petition made the formal order allowing the appellants to intervene, as follows:

"This cause coming on to be further heard on the petition of Alfred Young Chick and William Flanders Lewin for an order allowing the said petitioners to intervene in said cause as prayed for in said petition, Chas. Monroe, Esq., appearing as counsel for complainant, and John D. Works, Esq., appearing as counsel for petitioners, and complaint by its said councel having applied to the Court for leave to file the anser of Mercantile Trust Company, to petition and bill in intervention of Chick, et al., it is now by the Court ordered that the said application for leave to file said anser be, and the same hereby is, denied; *it is further ordered that the petition of Alfred Young Chick, and William Flanders Lewis, for an order allowing the said petitioners to intervene in said cause as prayed for in said petition be, and the same hereby is granted, and the bill of intervention and anser of Alfred Young Chick and William Flanders Lewin is thereupon filed in said cause.*"

Record p. 59.

It will be seen by the petition, with its prayer, and the order of the court made, that the petitioners be allowed to intervene as prayed for, that the intervention was regularly allowed by order of the Court, and that in conformity to the order of the Court they filed their bill in intervention. Thus the case had passed the stage of a mere application for leave to become parties, and the appellants had, by express order of the Court,

been made parties to the suit, with the right as prayed for in their petiton to file such pleadings as might be necessary to protect the interests of themselves and other stockholders. The bill in intervention will be found commencing on page 60 of the Record. The prayer of the bill is as follows:

"Wherefore, your intervenors pray your Honors that the bill of complaint herein be dismissed; that the receiver, John J. Seymour, appointed by your Honors, be discharged; that he be ordered and directed to immediately account to this Court for his management of the property of the defendant Company, and pay over all funds received by him as such receiver; that said John J. Seymour, as the President of said defendant Company, be required to apply the receipts and revenues of said defendant to the payment of the interest accrued upon the bonds described and set forth in the bill of complaint herein; that the said John J. Seymour and John S. Eastwood and said defendant company be perpetually enjoined from carrying out the scheme of re-organization set forth, or any reorganization of the said Company, and for such other relief in the premises as may to your Honors seem just and equitable."

Record p. 73.

This was followed by a motion on the part of the complainant to strike out part of the bill in intervention.

Record pp. 77-78.

This motion was granted, which is one of the grounds upon which our appeal is urged in this case. The complainant and the defendants, San Joaquin Electric Company, John J. Seymour and John S. Eastwood, regularly filed their answers to this bill in intervention.

Record pp. 80, 94, 108.

And to each of these answers, the intervenors regularly filed their replication.

Record pp. 105, 107, 119.

The motion to strike out parts of the bill in intervention was allowed, and the parts so stricken out are indicated in the record.

Record pp. 121-126.

Thus it will be seen that the petition for leave to intervene was allowed, and an order regularly made admitting the intervenors as parties to the action; that they filed their bill in intervention setting up the grounds upon which they claimed the bill of complaint should be dismissed, and the receiver enjoined from further proceedings under the original order made by the Court; that to this bill in intervention answers were regularly filed, and replications filed to said answers, thereby putting the case at issue upon the merits of the allegations of the bill in intervention. This being so, the authorities cited by counsel on the other side are not in point. They relate entirely to orders of the Court refusing to permit parties to intervene, and upon the ground that ordinarily the question as to the right of a third party to intervene is one resting in the discretion of the Court below; but in this case the Court exercised its discretion in favor of the petitioning parties, and they were allowed to intervene and beome actors in the proceeding.

I Beach Modern Equity, Secs. 579-580.

The final order of the Court appealed from in this case is double in its nature. There was a motion made by the respondents to vacate the order granting leave to the appellants to intervene. We know of no rule of practice that authorizes any such proceeding. But they were not content with an order of that kind, but procured also an order dismissing the bill in intervention of the appellants, precisely as an order would have been made if it had been directed at an original bill. The order is as follows, the recitals of which show that the case was submitted not only upon the motion to vacate the previous order, but upon the bill in intervention and the answers thereto:

"This cause having heretofore been submitted to the Court for its consideration and decision upon . . . the bill in intervention and the answers thereto, and upon the mo-

tion of the complaint that the Court vacate the order heretofore made herein, granting leave to A. Y. Chick & Company to intervene and become parties herein *and to dismiss the petition and bill in intervention*, and the Court having duly considered the same and being fully advised in the premises, now, on this 3rd day of September, 1901, being a day in the July Term, A. D. 1901, of said Circuit Court of the United States, for the Southern District of California, the court files its written conclusions *upon the bill in intervention* and orders that the order allowing the bill in intervention to be filed be vacated, *and said bill dismissed.*"

Record p. 349.

It is directly held by the Supreme Court of the United States that an interventor has a right to appeal from a final decree, and on that appeal contest the validity of interlocutory orders made subsequent to his admission as a party and affecting his interests in the litigation.

Beach Mod. Eq., Sec. 579.

Ex Parte Jordan, 94 U. S. 248.

In Ex parte Jordan, the Court says:

"It is true that the petitoners were not parties to the suit until after the bill was taken as confessed, but it is clear that a decree *pro confesso* did not end the case, because before the final decree was rendered it was found necessary to have a reference to a master to compute, ascertain and report. Before the master could comply with this order, proof had to be taken, and the original time given him to report was extended for that purpose. When this reference was made, the petitioners were defendants and actors in respect to the litigation. They certainly had the right to contend before the master and except to his report. This they did; and their exceptions were overruled. Even the report of the master did not put the case in a condition for a final decree. The amount due upon the bonds and coupons had still to be ascertained. This was done by the court, and stated in the decree. Against these findings, certainly, the petitioners were in a condition to contend, and if to contend below, to appeal here. It will be time enough to consider what relief they can have under their appeal when the case comes up.

"While complaint is made of interlocutory orders entered in the progress of the cause, the appeal lies and was asked

only from the final decree. Whatever comes here comes through such an appeal."

In this case, the decree entered dismissing the bill in intervention of the intervenors was unquestionably a final decree. It put them entirely out of the case, with no right to be further heard. It was disclosed by the bill in intervention, as appears from the record, that theirs was the only defense made to the original bill, and that the original defendant, the San Joaquin Electric Company, had by its answer confessed all of the allegations of the original bill.

Record p. 91.

The bill in intervention of the intervenors and the prayer thereof shows distinctly that they were not only appearing as defendants in the action, but were asking affirmative relief directed against new parties brought in by their bill in intervention, as well as the original parties to the suit, by way of injunction restraining such parties from proceeding further in the disposition and use of the property in controversy.

Record p. 73.

And we are not without authority in support of our right to appeal under the conditions presented by the record. In the case of Easton, et al., vs. Houston & T. C. Ry. Co., 44 Fed. Rep., 7, the question of the right of appeal upon the dismissal of a bill in intervention was directly presented, and the Court in that case said:

"The question presented is practically this: Was the decree of November 16, 1887, dismissing the intervention of the Waters-Pierce Oil Company, without prejudice, a final decree? It disposes of the intervention on its merits, leaving the intervenor with no cause before the Court. It turned the intervenor out of Court, and condemned him to pay costs. That the decree was to be without prejudice means no more than that the intervenor might institute another suit to enforce his alleged rights, and, at best, might, perhaps, intervene again on the same cause of action in this same cause. A decree is final when it determines the litigation on the merits, and leaves nothing to be done but to enforce by execution what has been

determined.. See St. Louis etc. Ry Co. vs. Southern Exp. Co., 108 U. S. 24; Railway Co. v. Dinsmore, 108 U. S. 30; Ex parte Norton, 108 U. S. 237. When an intervention under a claim of a prior lien is dismissed, the order as to the intervenor is final. Gumbel v. Pitkin, 113 U. S. 545."

And Gumbel v. Pitkin, 113 U. S., 545, is conclusive of the question. It is said in the opinion:

"The order dismissing Gumbel's intervention disposes of his rights and is a final judgment as to that issue, as to which he has a writ of error. The order distributing the proceeds of the sale is also final, as it disposes of the fund."

To the same effect is Savannah v. Jessup, 106 U. S.. 563. And in Central Railroad and Banking Co. v. Farmers' Loan & Trust Co., 79 Fed. Rep., 158-169, the distinction is clearly made that we are insisting upon here between an order dismissing a bill in intervention and an order denying the right to intervene. In the case last cited, it was held that the appeal did not lie, and the statement in the opinion is that neither Gumbel v. Pitkin nor Savannah v. Jessup supported the contention, for the reason that *in each of said cases an intervention was filed by leave of the Court, and afterwards heard on its merits.*

In Buller v. Fayerweather, the general rule as to what constitutes a final or appealable order or decree is thus stated:

"Whenever in a case there is a determination of some question or right, the decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the while merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the Court, so that to bring the case again before the Court for decision will not be necessary."

And the cases just above cited, and others, are referred to as sustaining this ruling.

The power of the Court below to admit the appellants as parties that they might protect their ownership and interest in the bonds of the defendant company against the fraudulent attempt on the part of the other bondholders to use the trustee

complainant to bring about an unnecessary foreclosure and reorganization of the company, was ocmplete and ample.

Knippendorf v. Hyde, 110 U. S. 276.

Having exercised its jurisdiction in this respect, and allowed the intervention, its subsequent order dismissing the bill in intervention was final, and subject to review on appeal.

We respectfully submit that the order and decree appealed from in this case was final, disposing of the case fully and entirely so far as the intervenors were concerned, and putting them out of the case, and that therefore they were entitled to an appeal, and the appeal in this case is properly taken.

GEORGE E. CHURCH,
L. A. GROFF
JOHN D. WORKS,
BRADNER W. LEE,
LEWIS R. WORKS,
Counsel for Appellants.